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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

STEPHANIE KIRSCHNER et al.,

Plaintiffs and Appellants,

v.

SERVICE CORPORATION
INTERNATIONAL et al.,

Defendants and Respondents.

B260044

(Los Angeles County
Super. Ct. No. BC491632)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Mark V. Mooney, Judge. Reversed.

Eagan Avenatti, Michael J. Avenatti and Ahmed Ibrahim for Plaintiffs and
Appellants.

Gurnee Mason & Forestiere, Steven H. Gurnee and Toby M. Magarian for
Defendants and Respondents.

Defendants Service Corporation International and SCI Funeral California Services, Inc. dba Eden Memorial Park, own and operate Eden Memorial Park Cemetery (the Cemetery), a Jewish cemetery in Mission Hills, California. Plaintiffs Stephanie Kirschner and Brad J. Kane sued defendants for allegedly moving their mother's remains from one niche to another without their consent. The trial court granted summary judgment on plaintiffs' complaint, and they appeal. We reverse.

BACKGROUND

The Complaint

As here relevant, plaintiffs alleged in their complaint that the remains of their mother, Jeanine Kane, were inurned at the Cemetery on April 1, 1979, in a niche in the Columbarium section that had been purchased by plaintiffs' father, B. Robert Kane. The niche was adjacent to that in which the remains of the famous comedian Groucho Marx were inurned.

On or about September 9, 2011, after plaintiffs' father died, plaintiffs and their stepmother went to the Cemetery to arrange the inurnment of their father's remains. An employee of the Cemetery, Nathan Samuels, showed them the proposed niche for their father and its relationship to their mother's niche. The niche Samuels indicated was their mother's was not the one they recalled, and was not adjacent to that of Groucho Marx.

Samuels showed plaintiffs the file for their mother's inurnment, which contained a purported contract for the purchase of their mothers' niche. The original niche number had been crossed out and a different number substituted. Plaintiffs told Samuels that they feared their mother's remains had been moved without authorization. Samuels replied that he believed plaintiffs, and that "a lot of

terrible things have happened at [the Cemetery]” but “the people responsible for it were not there anymore.”

On information and belief, plaintiffs alleged that the movement of their mother’s remains was part of a decades-long problem at the Cemetery of tampering with graves sites and improper handling of remains. Plaintiffs believed that defendants moved their mother’s niche because of its proximity to that of Groucho Marx in order to resell it for profit.

Based on these alleged facts, plaintiffs alleged three causes of action: intentional infliction of emotional distress, negligence, and tortious interference with a dead body.

Motion for Summary Judgment

Defendants moved for summary judgment¹ and produced the following evidence in support.

Defendants purchased the Cemetery in 1985. The Columbarium at issue contains niches that are designated by row (horizontal) and columns (vertical). According to the Cemetery’s records (copies of which were produced for the motion),² on June 2, 1975, Gene Bassman purchased the interment right for Row F, Niche 11 of the Columbarium for the remains of his wife, Felice Bassman. She was inurned there on June 22, 1975, and a marker plate with her name and date of birth and death was set on the niche on July 15, 1975.

¹ The motion was styled in the alternative a motion for summary adjudication, but the notice of motion failed to specify individual issues or causes of action to be adjudicated.

² The records were authenticated by a declaration from Anthony Lampe, the Cemetery’s General Manager.

The interment right for the niche directly below Felice Bassman's – Row G, Niche 11 – was purchased by Arthur Marx on September 19, 1977, to be used for his father, Groucho Marx. Groucho Marx was inurned there the next day, September 20, 1977.

On April 1, 1979, plaintiffs' father purchased the interment right for Row E, Niche 15, for plaintiffs' mother. That niche is below and four columns to the right of Groucho Marx's niche.

The purchase agreement dated April 1, 1979, had spaces in which to identify the niche by row and number. In the space for the row was the handwritten notation, "E." In the space for the niche was the handwritten notation, "15," which was preceded by thicker vertical strike out or correction covering perhaps a single digit.

The purchaser index card for the transaction was typewritten, and reflected the purchase of Row E, Niche 15. As reflected in the interment card, plaintiffs' mother was inurned in Row E, Niche 15 on June 3, 1979. Plaintiff's father had purchased a marker plate with her name and date of birth and death. According the interment-entombment index card, the marker was set on Row E, Niche 15 on June 3, 1979.

Cemetery records showed none of the families who purchased interment rights in close proximity to the niche of Groucho Marx paid any premium for the location. Each family who purchased rights in Rows E and F paid \$275 and those who purchased in Rows G and H paid \$300.

According to the declaration of Kenneth Bassman, who is the son of Gene and Felice Bassman, he was present when his mother's urn was placed into Row F, Niche 11, and he recalled that shortly afterward a marker with her name was placed there. A couple of years later, the remains of Groucho Marx were placed in

the niche above his mother's. He continued to visit his mother's niche over the years, and it was always the one directly below that of Groucho Marx. During his visits, there was no other name on Row F, Niche 11 other than his mother's, Felice Bassman. On his most recent visit in approximately 2005, his mother's name was still on that niche. He was not familiar with the name of plaintiffs' mother, Jeannine Kane, and never saw that name below Groucho Marx's niche in any of his visits.

At her deposition, plaintiff Stephanie Kirschner testified that she visited her mother's niche three times: twice in 1979 and once in June 1981. She did not visit between June 1981 and September 2011. She made arrangements for and attended a relative's funeral at the Cemetery in 2003, but did not visit her mother's site.

At his deposition, plaintiff Brad Kane testified that he visited his mother's niche twice in 1979 and once in 1982. He did not visit again until September 2011. He had attended funerals for relatives at the Cemetery in 1988 and 2003, but did not visit his mother's site on either occasion.

Evidence in Opposition

In opposition to summary judgment, plaintiffs relied on portions of their deposition testimony to dispute the following facts: that Gene Bassman had purchased the interment right to Row F, Niche 11; that Felice Bassman was inurned there in June 1975; that a marker plate with Felice Bassman's name was set on that niche; and that when Kenneth Bassman visited the site between 1975 and 2005, he saw Felice Bassman's nameplate on the niche. They also disputed that their father had purchased the interment right for Row E, Niche 15 and that their mother was inurned there.

In his deposition, Brad Kane testified that he was present when his mother's remains were inurned, and that the niche in which the remains were placed was directly below that of Groucho Marx. He recalled that his father and sister commented on that coincidence. Also, he had a strong memory of a visit in 1982 after hearing a report that the remains of Groucho Marx had been stolen from the Cemetery. He visited his mother's niche after Marx's remains had been returned. When he arrived, he observed that a nameplate with Groucho Marx's name was in place, having been specially secured by welding to prevent future thefts. He was concerned that damage might have been done to his mother's niche. Although there were welding marks on Marx's niche, there was no damage to his mother's niche directly below.

When Kane visited the Cemetery in September 2011 with his sister, the niche holding his mother's remains was one row down from Marx's and several columns to the right. After visiting the site, he was with his sister in the Cemetery office when they both commented that the niche was not where they recalled it to be. His sister said to Nathan Samuels that they believed their mother's remains had been moved. She stated that they had heard news reports of unethical behavior at the Cemetery and she was concerned that this was another example. Samuels replied that he believed what she said and he knew bad things had happened in the past but the people responsible were no longer there. When shown a document purporting to be the purchase contract for his mother's niche, Kane believed the document had been altered because in the space for the niche there was a cross out mark immediately before the number "15."

At her deposition, Stephanie Kirschner testified that in 1979 her mother was inurned in Row F, Niche 11, directly below the niche of Groucho Marx (Row G,

Niche 11). Her mother's remains were still there when Kirschner visited the site in June 1981. The family used to joke that Groucho Marx was on top of her mother.

She believed that the purchase contract for her mother's niche "may show" that her mother's remains were placed in Row F, Niche 11, because "it appears that [the contract] was changed." There was a cross out immediately before the handwritten niche number "15," and the row letter "E" had "perhaps" been altered from an original letter "F."

As did Kane, Kirschner recalled that when she told Samuels that her mother's remains were not where they were originally placed, Samuels said that he believed her and that a lot of terrible things had happened but those responsible did not work there anymore.³

Argument and Ruling

In support of their summary judgment motion, defendants argued that plaintiffs recollections that their mothers' remains were placed in Row F, Niche 11 in 1979 were insufficient to raise a triable issue. Defendants relied on their evidence (the Cemetery records and declaration of Kenneth Bassman) that the remains of Felice Bassman have occupied Row F, Niche 11 since 1975, and on plaintiffs' failure to produce any evidence that their father purchased that niche as opposed to Row E, Niche 15, which is the niche listed in all the records relating to their mother's inurnment and the niche in which their mother's remains resided when plaintiffs visited in 2011.

³ As part of their reply to plaintiffs' opposition, defendants produced an excerpt from the deposition of Nathan Samuels in which he denied telling plaintiffs that he believed them and that terrible things had happened in the past but those responsible were gone.

Defendants also argued that plaintiffs' claims were barred by the two-year statute of limitations (Code Civ. Proc., § 335.1), because the delayed discovery rule did not apply. The evidence was undisputed that as of Kenneth Bassman's last visit to Row F, Niche 11 in 2005, the plate of his mother Felice Bassman was set on that niche. According to defendants, even assuming plaintiffs were correct that their mother's remains were inurned in that same niche in 1979, plaintiffs failed to exercise reasonable diligence to discover the alleged movement of the remains to Row E, Niche 15. Between Kane's visit in 1982 and the visit of both plaintiffs in 2011, plaintiffs never visited the niche, even though both had attended a relative's funeral at the Cemetery in 2003. Had they visited, they would have observed the markers on the relevant niches long before their visit 2011.

Finally, defendants argued that plaintiffs claim for intentional infliction of emotional distress failed because defendants could not establish when their mother's remains were allegedly moved after 1982. Defendants did not purchase the Cemetery until 1985, and there was no evidence that defendants were responsible for the move, that they resold the niche, or that they intended to inflict emotional distress on plaintiffs.

In opposition to the motion, plaintiffs argued that their deposition testimony created a triable issue of fact as to where their mother's remains were inurned. As to defendants' statute of limitations argument, plaintiffs argued that their claims – all of which sought emotional distress damages – did not accrue until 2011 when they discovered their mother's remains had been moved. Further, there was no evidence as to when the move occurred, they were not on notice of the move, and they had no duty to visit the niche regularly to see if the remains had been moved. Therefore, it could not be argued that they failed to use reasonable diligence to discover their injury.

As to the argument that the claim for intentional infliction of emotional distress failed for want of evidence, plaintiffs argued that the unauthorized tampering with a decedent's remains necessarily supports a claim for intentional infliction of emotional distress. Further, there was a question of fact whether defendants, as opposed to those in control of the Cemetery before defendants purchased it in 1985, caused the remains to be moved.

At the hearing on the motion, the trial court focused on the strength of the evidence presented by defendants showing that the remains of Felice Bassman have been inurned in Row F, Niche 11 since 1975, the strength of the evidence that the remains of plaintiffs' mother have been inurned in Row E, Niche 15 since her inurnment in 1979, and the weakness of the evidence that those remains ever occupied Row F, Niche 11. The court stated in part: "The evidence here is just so overwhelming. You get to the point . . . where you just say there's no 'there' there. . . . [Plaintiffs] vaguely recall, . . . wasn't that where it was? . . . I think they're probably sincere in their recollection. There's no effort on their part to deceive. . . . But the evidence is just overwhelming that [plaintiffs' mother] was buried in one location at all relevant times. Ms. Bassman was in Row F, Niche 11. There's simply no evidence that [plaintiffs' mother] was ever moved and no evidence that [she] was ever in any place other than . . . in Row E, Niche 15. So I'm going to go ahead and grant the summary judgment in this matter." The court directed defendants to prepare an order, which they did. The court executed the order. In addition to detailing the reasons the court granted summary judgment, the order also stated that the court overruled all of plaintiffs' objections to defendants' evidence. The order did not rule on defendants' objections to plaintiffs' evidence. Judgment was later entered, and plaintiffs timely appealed.

DISCUSSION

Defendant contends that by crediting the defense evidence and discounting plaintiffs' deposition testimony, the trial court erred in granting summary judgment. We agree.

The standards governing summary judgment motions are settled: "First, and generally, from commencement to conclusion, the party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law. . . . There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of the fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*)). The moving party bears the initial burden of production to show the nonexistence of any material triable issue, and if he does so, the burden switches to the opposing party to make a prima facie showing of such a triable issue. (*Ibid.*) "[H]ow the parties moving for, and opposing, summary judgment may each carry their burden of persuasion and/or production depends on *which* would bear *what* burden of proof at trial." (*Id.* at p. 851.) Thus, a defendant moving for summary judgment against a plaintiff who has the burden of proof by a preponderance of the evidence, "must present evidence that would *require* a reasonable trier of fact *not* to find any underlying material fact more likely than not — otherwise, *he* would not be entitled to judgment *as a matter of law*, but would have to present *his* evidence to a trier of fact." (*Ibid.*)

In ruling on a summary judgment motion, the trial court determines only whether triable issues of fact exist; it does not resolve those issues. (*EHP Glendale, LLC v. County of Los Angeles* (2011) 193 Cal.App.4th 262, 270.) The court must consider all of the evidence and inferences to be drawn from it, and

determine “what any evidence or inference *could show or imply to a reasonable trier of fact.*” (*Aguilar, supra*, 25 Cal.4th at p. 856.) Therefore, “if any evidence or inference therefrom shows or implies the existence of the required element(s) of a cause of action [or defense], the court must deny a . . . motion for summary judgment or summary adjudication because a reasonable trier of fact could find for the [opposing party].” (*Smith v. Wells Fargo Bank, N.A.* (2005) 135 Cal.App.4th 1463, 1474 (*Smith*).) We review a trial court’s order granting a motion for summary judgment or summary adjudication de novo. (*Smith, supra*, 135 Cal.App.4th at p. 1471.)

Here, an alleged fact essential to all of plaintiffs’ causes of action is that on June 3, 1979, their mother’s remains were inurned in Row F, Niche 11, directly below that of Grouch Marx, and a plate with her name was later set on that niche. Defendants produced compelling evidence – the Cemetery records relating to all relevant niches and the declaration of Kenneth Bassman – to prove that this fact is not true, and that the remains of plaintiffs’ mother have always occupied Row E, Niche 15. In opposition, plaintiffs relied on their deposition testimony stating their recollection that when their mother’s remains were inurned in 1979, the remains were placed in the niche directly below that of Groucho Marx. Their collective memory was reinforced by their recollection that their father and plaintiff Kirschner commented on the coincidence and their recollection that in three subsequent visits by each of them (the last by plaintiff Kane in 1982) their mother’s remains (as indicated by the plate with her name) were in the same niche.

We recognize, as did the trial court, that there is considerable evidence casting doubt on their recollections that plaintiffs fail to explain. Further, we agree that on the face of the purchase contract signed by plaintiffs’ father designating Row E, Niche 15 (two copies of which were produced, one by defendants and one

by plaintiffs), there is no evidence to prove that the contract originally designated Row F, Niche 11. The sole strike-out mark in the space for the niche number simply does not reasonably suggest that the original number was 11 rather than 15, and there is nothing to indicate that the row designation “E” was crafted from an original designation “F.” Plaintiffs’ belief that such an alteration occurred does not elucidate the point. Moreover, we note that plaintiffs failed to present any evidence to suggest that the purchase contract executed by Gene Bassman for Row F, Niche 11, dated more than three years before the purportedly altered contract, as well as the inurnment record showing Felice Bassman was placed in that niche, were somehow forged.

Finally, we agree that the alleged statement by Nathan Samuels that he believed plaintiff’s claim and that bad things had been done at the Cemetery in the past added little or nothing to plaintiffs’ showing. Samuel’s personal belief in plaintiffs’ claim is irrelevant, and it is difficult to see how his vague statement that bad things had been done in the past can lead to a reasonable inference that the remains of plaintiffs’ mother were moved.

Nonetheless, despite these weaknesses, plaintiffs did offer evidence – their personal observations of their mother’s inurnment and later visits to her niche – which, if believed, could lead a reasonable trier of fact to conclude that their mother’s remains were originally inurned in Row F, Niche 11. That defendants’ evidence shows plaintiffs are wrong, and that plaintiffs have produced no evidence to explain away most or all that evidence, does nothing more under the standard of review for summary judgment than create a triable issue of fact. To reach the conclusion that there is no triable issue as to where the remains of plaintiffs’ mother were initially inurned, we would have to credit defendants’ circumstantial evidence as to where the remains were inurned, and discount the testimony of

plaintiffs, who were percipient witnesses to the inurnment. Plaintiffs may well be wrong (indeed, this record strongly suggests that they are), but that is a determination beyond the proper role of an appellate court reviewing a grant of summary judgment. In short, plaintiffs' deposition testimony is sufficient to raise a triable issue that their mother's remains were placed in Row F, Niche 11, and at some later date moved to Row E, Niche 15.

Defendants argue, as they did in the trial court, that even if plaintiffs raised a triable issue whether their mother's remains were moved, their claims are barred by the two-year statute of limitations (Code Civ. Proc., § 335.1). According to defendants, plaintiffs' failure to visit their mother's niche for more than 30 years demonstrates that they failed to exercise reasonable diligence in discovering the alleged movement of their mother's remains, and thus the discovery rule does not toll the statute of limitations. However, defendants misunderstand the discovery rule, under which "the statute of limitations begins to run when the plaintiff suspects or should suspect that her injury was caused by wrongdoing, that someone has done something wrong to her." (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1110.) In other words, "the limitations period begins once the plaintiff ""has notice or information of circumstances to put a reasonable person on inquiry"" [Citation.]" (*Id.* at pp. 1110-1111.) It is "a *suspicion* of wrongdoing, coupled with a knowledge of the harm and its cause," that begins the limitations period. (*Id.* at p. 1112.)

Here, plaintiffs had no legal duty to visit their mother's niche in order to determine whether her remains had been moved. To the contrary, they were entitled to assume that once inurned, the remains would not be moved. There is simply no evidence that plaintiffs knew or reasonably should have suspected before their visit in 2011 that their mother's remains were allegedly not in her

original niche. Once they discovered the alleged movement, they timely filed their action.

Defendants also argue that plaintiffs cannot establish that the defendants, who purchased the Cemetery in 1985, as opposed to prior owners, moved their mother's remains. To the extent defendants now raise this issue regarding all three of plaintiffs' claims, they extend the argument beyond what they argued in the trial court. Below, they made this argument solely as to the claim for intentional infliction of emotional distress. Therefore, they forfeited contention as to the remaining causes of action. (*Medical Bd. of California v. Chiarottino* (2014) 225 Cal.App.4th 623, 632.) In any event, defendants' evidence failed to shift the burden of production to plaintiffs on this issue. That is, defendants did not produce evidence as to the identity of the prior owners, whether the alleged movement of the remains was likely a result of the prior owners' misconduct, or that the nature of defendants' purchase of the Cemetery precluded successor liability for the torts of the prior owners. (See *Brown Bark III, L.P. v. Haver* (2013) 219 Cal.App.4th 809, 822-823, and fn. 5 ["successor liability is an equitable doctrine that applies when a purchasing corporation is merely a continuation of the selling corporation or the asset sale was fraudulently entered to escape debts and liabilities"; it also applies "when (1) it [the purchasing corporation] expressly or impliedly agrees to assume those debts and liabilities; (2) the asset sale amounts to a consolidation or merger of the two corporations; or (3) a consumer is injured by one of the selling corporation's products that the purchasing corporation continues to manufacture and sell."].) Thus, summary judgment could not be granted on the ground that the alleged movement might have occurred before defendants purchased the Cemetery.

DISPOSITION

The judgment is reversed. Plaintiffs shall recover their costs on appeal.

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WILLHITE, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.